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Supreme Court, U.S.
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No. 01-817

In the
Supreme Court of the United States

DINO'S VICTORY ROADHOUSE, INC.
And DEAN GETTLESON,
Petitioners,

v.

CITY OF LOS ANGELES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners filed their Petition for Writ of Certiorari on November 17, 2001 and the City of Los Angeles, after obtaining extensions of time to file its opposition, filed its opposition on February 8, 2002. Supreme Court Rule 15(6) authorizes this Reply Brief addressed to new points raised in the brief in opposition.

The brief in opposition distorts the fact and attempts to insulate the California Court of Appeal's decision from this Court's review. A municipality which obtains a favorable ruling by a state appellate court should not be able to defeat certiorari jurisdiction by the manipulation of the facts and procedure.

The City attempts to mislead this Court by implying that dancers at Petitioners' bar have been dancing with their breasts exposed since 1998. The City asserts that Petitioners have suffered no injury and that therefore the decision of the California Court of Appeal is insulated from this Court's review. In the first paragraph of the City's opposition the City states that "[T]he Court of Appeal decision recognizes that dancers at Petitioner's bar began exposing their breasts in 1998. . . ." (Brief in Opposition, p.1).

The Court of Appeal's decision states that ". . . In early 1998 some dancers at Plaintiffs' bar did expose their breasts. . . ." (Appendix to Petition, p.6a). However, as the opinion of the Court of Appeal goes on to say, in September of 1998 the City issued an Order to Comply with Section 12.70(C). Petitioners did comply by ceasing the presentation of topless dancing. Instead, Petitioners filed a federal civil rights lawsuit seeking to enjoin enforcement of the ordinance. See opinion of State Court of Appeal at Appendix 6a.

The City then goes on to say at page 3 of its opposition,

> ". . . Nor does the record demonstrate that the petitioner ever sought an injunction to prevent the city from enforcing any order limiting the presentation of adult entertainment. . . ."

Petitioners cannot believe that the City would make such an argument in the face of the opinion of the Court of Appeal, which states,

> ". . . Plaintiffs responded with a federal court action seeking to enjoin enforcement of the ordinance. . . ." (Petitioner's Appendix 6a).

Petitioner is at a loss to know why the City would make the statement at page 3 of its opposition that Petitioners never sought an injunction when in fact they did so, as the opinion of the Court of Appeal recognizes.

Indeed, at page 9 of their Petition for Writ of Certiorari Petitioners made reference to the fact that they did seek an injunction from the federal district court. Petitioners asserted at page 9 of their Petition,

> "Instead of first applying for the permit, Petitioners challenged the constitutionality of the permit ordinance on the ground that the procedures are too slow and prompt judicial review is not available. The United States District Court for the Central District of California denied Petitioners' request for a preliminary injunction. Among other things the District Court agreed with the City's

> argument that Petitioners had to exhaust available administrative remedies. Pursuant to stipulation with the City, Petitioners dismissed their federal action without prejudice."

In other words, the City argued successfully in the federal district court that Petitioners' only remedy was to pursue their administrative remedies. They did so. This Petition for Writ of Certiorari is the last step in the process.

Contrary to the facts, the City falsely asserts that Petitioners never sought an injunction.

What is especially upsetting to Petitioners is the failure of the City to acknowledge in its opposition that not only did Petitioners seek an injunction, which the City claims did not occur, the City itself argued in the federal district court that Petitioners' sole remedy was to apply for the permit (the exception). That is, the City argued successfully in the federal district court that Petitioners were required to exhaust available administrative remedies, which is exactly what they are doing.

To make matters worse, the City also erroneously relies upon California Code of Civil Procedure Section 1094.5(g) for the proposition that a court can grant a stay of an administrative order or decision. This is a blatant misrepresentation of California procedural of law. Code of Civil Procedure Section 1094.5(g) states, in part, as follows:

> "[T]he court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court. . . ."

What this means is that if there has been an order or decision suspending or revoking a permit or a license, such order or decision may be stayed pending state judicial review. In the instant case, however, there is no order or decision to be stayed. Had there been an order or decision that could have been stayed, Petitioners would have sought an emergency stay under Code of Civil Procedure Section 1094.5(g) when they filed their lawsuit in the Superior Court of California. Nothing could be stayed because what the Petitioners challenged in the Superior Court was the denial of the exception. One cannot "stay" a denial. There is nothing to stay.

Accordingly, the City's statement at page 3 - "their failure to seek such relief precludes this Court's review. . . . -is simply wrong.

Indeed, Petitioners won in the Superior Court. They not only obtained an order from the Superior Court setting aside the denial of the permit (the exception), they also obtained an order compelling the City to grant the exception. That is better than a temporary stay under Code of Civil Procedure Section 1094.5(g). That is a ruling on the merits.

Unfortunately the City did not honor the judgment of the Superior Court by granting the exception (the permit). Instead, the City appealed to the California Court of Appeal. California Code of Civil Procedure Section 916 automatically stayed the judgment in favor of Petitioners. Code of Civil Procedure Section 916 (a) is reprinted at page 4 of the Petition for Writ of Certiorari. Therefore, the record before this Court conclusively establishes that the judgment in favor of Petitioners was stayed pending appeal by virtue of Code of Civil Procedure Section 916. Indeed, we are beyond the issue of the stay because the Court of Appeal "reversed" that

portion of the Superior Court's judgment compelling the City to grant the permit (the exception). Instead, the California Court of Appeal remanded the matter to the Superior Court with directions to allow the City to have another administrative hearing.

The issue before this Court is whether the City, consistent with the First Amendment, may avoid the issuance of the permit (the exception) by simply conducting another administrative hearing. As matters stand now, and the record is undisputed on this point, Petitioners not only lack the required permit (the exception) they have never had one!

The City should not be able to manipulate this Court's certiorari jurisdiction with false representations as to the record. The City has asserted that if Petitioners do operate a topless facility they will be violating the Municipal Code and each day is a separate violation for which there is a misdemeanor sanction (one year in the county jail). The City has one year to file criminal charges against Petitioners if they do operate as an adult facility without the exception. The fact is they lack the exception (the permit) and the City has threatened action.

It is no answer to say that if Petitioners do violate the ordinance by presenting topless dancing and if they do get convicted they are free to challenge any convictions in court. They may not do so because the decision of the California Court of Appeal becomes the law of the case (unless reversed by this Court) and administrative agencies and courts will be obligated under California law to follow the decision of the Court of Appeal. If the decision of the Court of Appeal is contrary to the First Amendment, this Court has jurisdiction to review that decision.

Whether or not some dancers at Petitioners' business chose to dance topless or not on a limited basis, thereby subjecting the premises to misdemeanor prosecutions, is irrelevant to this Court's certiorari jurisdiction.

This case is not moot and there is a live controversy. If the decision of the State Court of Appeal stands, Petitioners will still be without the required permit (exception) and would be required to go through further administrative hearings.

Not only has the City never told Petitioners that they may operate as an adult facility while these proceedings are pending, they have affirmatively told Petitioners that if they operate as an adult facility without the permit or exception (and they still lack the permit or exception), they will be subject to criminal prosecution.

The City argues that the instant case is very similar to City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 121 S.Ct. 743 (2001), but it is significantly different in one material respect. As this Court pointed out in footnote 2 of its decision, "[T]he [Waukesha] Council expressly permitted City News to continue in business during the pendency of state - court proceedings. . . ." In contrast, the City of Los Angeles has not expressly permitted Petitioners to operate in violation of the City's adult zoning code. To the contrary, the City has threatened enforcement action. The only thing that can prevent the City from enforcement is the grant of certiorari by this Court and a ruling that the Court of Appeal erred in allowing the City of Los Angeles a second bite of the apple, especially where the City has not "expressly permitted [Petitioner] . . . to continue in business during the pendency of state - court proceedings. . . ."

This Court ultimately dismissed the certiorari petition in City News and Novelty, Inc. v. City of Waukesha, supra, because this Court was of the view that petitioner City News and Novelty had closed its business. This Court stated in City News and Novelty, Inc. v. City of Waukesha, 531 U.S. at ____, 121 S.Ct. at 746.

> "It is undisputed that City News has ceased to operate as an adult business and no longer seeks to renew its license.
> Observing that City News neither pursues nor currently expresses an intent to pursue a license under Waukesha law, Waukesha asserts that the case has become moot, for City News no longer has 'a legally cognizable interest in the outcome.'"

In contrast, Petitioners here clearly have an interest in the outcome of this case. They want this Court to reverse the Court of Appeal below on the issue of whether the matter can be remanded to the City for further proceedings. They assert they are entitled to their permit (exception), having already gone through a lengthy administrative process once and having prevailed in the Superior Court and the Court of Appeal on the issue of whether the City properly denied the permit (exception). Since Petitioners prevailed in the Superior Court and in the Court of Appeal on the issue of whether they were denied properly, they should be able to obtain the required permit (exception). They should not be relegated to endless administrative hearings, especially where the City has not expressly permitted Petitioners to operate and where there is no ordinance allowing such activity without the required permit (exception).

It is extremely important for this Court to grant certiorari because these procedural problems confront many persons seeking to exercise First Amendment rights who are relegated to ineffective state court procedure. It is time for this Court to review this entire issue.

The City has produced no evidence that it has expressly allowed Petitioners to operate without the permit or the exception. The City has referred us to no evidence that provides that until final judicial review is obtained one may operate as though one possesses the required permit or exception.

The City wants the decision of the State Court of Appeal to stand so that the City can then hammer the Petitioners. This Court has jurisdiction to review the decision of the California Court of Appeal and the City has not advanced one argument that this Court is without jurisdiction to hear the matter.

A lot of cynics believe that when state court decisions favor the government (and not the First Amendment), that this Court allows the decisions to stand but when the opposite is true, City of Erie v. Paps A.M., 529 U.S. 277, 146 L.Ed.2d 265, 120 S.Ct. 1382 (2000) this Court will grant certiorari to reverse a judgment of a State Supreme Court even when the case appears to be as moot as the City of Erie case. Certiorari should be granted so that this Court can explain that its mootness jurisdiction is neutral and is not manipulated to allow anti First Amendment state court cases to stand and to reverse pro First Amendment state decisions.

Respectfully submitted,

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